No. 77-1500

Supreme Court, U. S.
FILED
APR 20 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

JACK E. WALKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Petitioner, Jack E. Walker, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit, entered December 12, 1977, affirming a judgment of conviction against him entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The Opinion of the United States Court of Appeals entered December 12, 1977, is not reported, but is printed in full as Appendix D in the Joint Appendix filed on behalf of petitioners Walker and petitioners Markert, Craig, North, and Pappas, at p. App. 59 et seq. (hereinafter cited as "Jt. App.").

JURISDICTION

The judgment of the Court of Appeals was entered December 12, 1977, and petitioner's timely Petition for Rehearing was denied March 21, 1978 (Jt. App. E, p. App. 152). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the use of the mails shown in connection with the substantive mail fraud counts was sufficiently related to the alleged scheme to invoke federal jurisdiction under the mail fraud statute?

2. Whether the offense of conspiracy to violate the mail fraud statute includes the essential element of agreement to use the mails, thus requiring proof of that element and the giving of an appropriate instruction to the jury?

3. Whether petitioner was denied a fair trial by the prosecutor's refusal to produce, upon petitioner's specific request, written statements and grand jury testimony of persons not called by the Government, where such statements and testimony contradicted the testimony of Government witnesses at trial?

4. Whether the making and evidentiary use by the Government of recordings of telephone conversations between

petitioner and an alleged accomplice turned Government informant, under the circumstances of the case, impinged upon petitioner's rights to due process of law under the Fifth Amendment and to counsel under the Sixth Amendment?

5. Petitioner hereby adopts the Questions Presented in Petitions for Certiorari filed contemporaneously by co-defendants Robert Craig, Frank P. North, Jr., and Peter V. Pappas, and by petitioners Robert Craig and Louis A. Markert, insofar as such questions apply to him.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Title 18, United States Code, §371:

> If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned. . . .

Title 18, United States Code, §1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or

> receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined . . . or imprisoned. . . .

STATEMENT OF THE CASE

Petitioner was convicted in the District Court, on the verdict of a jury, of conspiracy to commit mail fraud and of three substantive counts of mail fraud.

The indictment alleged a plan whereby persons associated with the ready-mix concrete industry attempted to obtain passage by the Illinois General Assembly of a bill (H.B. 4176) which would have authorized an increase in the maximum gross weight permitted for ready-mix concrete trucks.

Count One of the indictment charged a conspiracy involving fifteen defendants and several unindicted co-conspirators which had as its object a scheme to defraud the citizens of Illinois of their right to the loyal, faithful and honest services of public officers, particularly members of the General Assembly. The scheme was charged to be in violation of federal law because it contemplated the knowing use of the United States mails.

The basic outline of the scheme charged in the indictment is as follows: the defendants and co-conspirators who were associated with the ready-mix concrete industry agreed to raise a sum of money to be paid to members of the General Assembly for the purpose of influencing them in connection with the passage of H.B. 4176. Those defendants who were members of the General Assembly, including petitioner, together with the defendant Peter V.

Pappas, an employee of the Secretary of State of Illinois, agreed to accept such money with knowledge that it had been promised with intent to influence them unlawfully in the performance of their public and official functions. The conspiracy count alleged the activities charged to the various defendants and co-conspirators in connection with the preparation of the legislation and its progress to passage by the General Assembly. The indictment further related the manner in which the moneys used to accomplish the unlawful purpose were raised and accounted for by the various persons and entities associated with the ready-mix concrete industry. There was no evidence whatsoever linking petitioner with preparing the legislation, obtaining the approval of the Illinois Motor Vehicle Laws Commission, raising the money which was to be paid to legislators and others, or accounting for that money. Therefore, although these activities were all alleged to be a part of the general conspiracy of which the petitioner stands convicted, it is unnecessary to detail those allegations and the evidence related to them in this statement. Reference is made to the Opinion of the Court of Appeals for a description of those factual aspects of the case (Jt. App. 59-80).

Each of the eleven counts charging substantive violations of the mail fraud statute alleged that the defendants and co-conspirators devised a scheme to defraud similar in its objects to the conspiracy charged in Count One, and each of these counts charged a specific mailing in furtherance of that scheme. Petitioner was charged with and convicted of the substantive offenses alleged in Counts Ten, Eleven and Twelve of the indictment. The mailings involved in Counts Ten and Eleven both were bulletins issued by ready-mix concrete trade associations exhorting members of those associations to write the Governor urging him to sign H.B. 4176. There was no evidence that

petitioner had anything to do with those bulletins or that he even knew of their existence. The mailing involved in Count Twelve consisted of five one hundred dollar bills which a witness testified he had mailed to petitioner as his share of the proceeds of the scheme. The mailings involved in Counts Ten and Eleven, and a "mock-up" of the mailing envelope involved in Count Twelve, are reproduced in appendices to the Dissenting Opinion of Judge Swygert, Jt. App. 149-151.

Petitioner and Donald D. Carpentier were Illinois senators in the 77th General Assembly. Carpentier had pleaded guilty to Count One of the indictment (Tr. 2507), and was awaiting sentencing at the time of his testimony at trial. He testified that Representative Pete Pappas (who, as a result of early plea bargaining with the government, had pleaded guilty to an information charging the filing of a false income tax return), had informed Carpentier that there would be money on H.B. 4176 (Tr. 2513). One or two weeks prior to the introduction of H.B. 4176 in the House of Representatives on April 11, 1972 (Tr. 2514), Carpentier agreed with Rep. Pappas and Sen. Robert Craig that Carpentier would "handle" the Senate Republicans in connection with the bill (Tr. 2518). After H.B. 4176 had been introduced in the House on April 11, 1972, Sen. Carpentier had a conversation with Rep. Pappas and Peter V. Pappas (who are not related). Peter V. Pappas stated that, if the bill passed both houses and was signed by the Governor, each side of the aisle in both houses would receive $10,000.00, that if the bill passed only the House and was defeated in the Senate, there would be $5,000.00 for the House on both sides of the aisle, and if it passed both houses but was vetoed by the Governor there would be $5,000.00 for each side of the aisle in both houses (Tr. 2526).

On May 15, 1972, H.B. 4176 was introduced in the Senate (Tr. 2526). About a week or two before that, Carpentier began talking with Republican senators, eventually speaking to ten of them, including petitioner (Tr. 2527). That conversation took place on the Senate floor a week or two before introduction of H.B. 4176 (Tr. 2528-2529). Carpentier asked petitioner if he would support the Senate bill, and petitioner said he would. Carpentier said that "there would be help in his district" (Tr. 2529). At that time Carpentier said nothing about money to petitioner or to the other senators. He told them all it was a good bill, that he would appreciate their support, and that there would be "help in their district" (Tr. 2638).

About a week before H.B. 4176 passed the Illinois Senate on June 21, 1972 (Tr. 2531), Carpentier had another conversation with petitioner on the senate floor. He asked petitioner to "handle" the bill, stating that $500.00 would be given to him for this service. Petitioner agreed to handle the bill, and it passed (Tr. 2532), but was vetoed by the Governor.

On approximately September 25, 1972, Carpentier received $5,000.00 in $100.00 bills from representative Pappas (Tr. 2537-2547). Petitioner was not present at that meeting and had no knowledge of it. Carpentier testified that he took the $5,000.00 to his office (Tr. 2548), he had his wife type the addresses of nine Republican senators on plain envelopes, and placed currency from the sum received from Pappas in each of the envelopes (Tr. 2548-2551). He testified that he placed five $100 bills in the envelope addressed to petitioner and one $100 bill in each of the eight other envelopes (Tr. 2551). He then mailed these envelopes (Tr. 2552).

According to Carpentier, petitioner never acknowledged receipt of the envelope, nor did he ask about the money (Tr. 2641). Of the nine senators who received envelopes, only three acknowledged their receipt, two orally and one by a note which Carpentier said he no longer had at the time of trial (Tr. 2641-2644).

Petitioner testified at trial, denying both that he was offered money and that he received any money in connection with the bill (Tr. 4195 et seq.).

Before trial, petitioner filed an original (R. 71) and Supplemental Motion to Suppress (R. 165) recordings and oral testimony of the content of three incriminating telephone conversations between himself and Carpentier on June 10 and July 12, 1974. After an evidentiary hearing on these motions, the court denied them, and the recordings were received in evidence at trial (Govt. Ex. 105A, 106A, 107A).

Carpentier (Sup. Tr. 240-301) and his attorney, James Coryn (Sup. Tr. 190 et seq.), testified that Carpentier had been called before the grand jury investigating this case in 1973. Subsequently, in December of that year, he consulted Coryn, who conducted negotiations which led to the execution of a written agreement whereby Carpentier agreed to plead guilty to one count of the indictment and to cooperate in the investigation. While that agreement was in force, but before the return of the indictment in December, 1974, Carpentier, upon advice of Coryn, permitted postal inspectors to attach a tape recorder to his office telephone (Sup. Tr. 245) and he recorded two conversations with Walker on June 10, 1974, and one on July 12, 1974.

The first conversation was initiated by Walker (Sup. Tr. 287). When it was concluded Carpentier telephoned Samuel K. Skinner, who then was the Assistant United States

Attorney supervising the investigation. Skinner told Carpentier to call Walker back to try to talk about the money he had paid Walker and to let Walker talk. Skinner asked Carpentier not to disclose the fact that he had become a government informant because that would negate any impact of the recording (Sup. Tr. 512-513). Carpentier then placed the second call to defendant Walker (Sup. Tr. 288-290). The third call occurred about one month later.

As the Court of Appeals acknowledged in its Opinion, prior to any recordings the government was aware that petitioner had retained counsel (Jt. App. 81).

Upon return of the indictment, petitioner submitted requests for the following (R. 71):

> 4. — All handwritten notes and memoranda, typewritten notes and memoranda, or transcripts or recordings of oral testimony of any person interviewed or contacted by investigating agents or attorneys of the government during each course of the investigation leading to the return of indictment No. 74 CR 879 as to persons whom the government does not intend to call as witnesses at trial.
>
> • • •
>
> 9. — All exculpatory documents, information and evidence of any kind favorable to defendant Walker.

In a "Statement of Compliance with Local Rule 2.04" filed thereafter, the government responded to these requests as follows (R. 39):

> 4. Request number 4 is denied.
>
> • • •
>
> 9. Request number 9 relative to Brady material is granted.

The government did furnish petitioner with material before trial, but that material did not include the statement or grand jury testimony of nine persons who had been Illinois senators at the time of the relevant events. Car-

pentier had claimed to have approached the nine senators seeking their participation in the alleged scheme. Petitioner and his counsel became aware that Carpentier had implicated these senators when the government furnished Carpentier "Jencks" material (18 U.S.C. §3500) at trial. Thereupon, at the conclusion of Carpentier's direct examination, petitioner moved for the production of statements and grand jury testimony given by these nine senators.

The Assistant United States Attorney opposed this request on the ground that ". . . this matter is not completely closed so far as the Grand Jury and the United States Attorney's Office is concerned." The prosecutor observed that defense counsel knew the identities of the nine senators and could subpoena them (Tr. 2576-2578). The court denied the request for production and declined to examine the material *in camera*, as requested by petitioner; instead, the government turned over the material to the court in a sealed envelope (Tr. 2667-2672).

After trial, the court decided to open the envelope and to make its contents available to petitioners. The documents showed that all nine senators had denied any unlawful agreement with Carpentier. Five of the eight to whom Carpentier said he sent money had denied receiving it. Two had acknowledged receiving $100 by mail, but had denied knowledge of the source. These denials contradicted Carpentier's testimony at trial.

A divided panel of the Court of Appeals affirmed the judgment (Swygert, J., dissenting). Jt. App. 59-153.

REASONS FOR GRANTING THE WRIT

1. The decision below extends federal jurisdiction under the mail fraud statute beyond the intent of Congress and beyond the interpretation of prior decisions of this Court.

Petitioner and his co-defendants in the courts below challenged the sufficiency of the evidence on the ground that all eleven count mailings were too remote and incidental to be in furtherance of the scheme to defraud.[1] On appeal, the Court rejected this contention (Jt. App. 95-102), Judge Swygert dissenting (Jt. App. 127-143). We respectfully submit that Judge Swygert's position is correct and that, if it is, this Court should correct an error that inevitably will affect numerous cases in the future.

This Court has repeatedly held that the mailings relied upon to establish federal jurisdiction, though they need not themselves be false or fraudulent, must play an integral, significant role in carrying out the fraudulent scheme. *United States* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *United States*, 363 U.S. 370 (1960); *Kann* v. *United States*, 323 U.S. 88 (1944).

The majority of the court below sustained the convictions on all eleven substantive counts, evidently by accepting the idea that any use of the mails, however attenuated

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[1] Though petitioner was charged with only three of the substantive counts, he also was convicted of the conspiracy. All eleven mailings were alleged as overt acts in the conspiracy count. If all eleven of those mailings were insufficiently related to the scheme to support federal jurisdiction, then the conspiracy count must also fail. *Parr* v. *United States*, 363 U.S. 370, 393 (1960).

from the fraudulent scheme, is sufficient if such use is "incidental to an essential part of the overall scheme" (Jt. App. 98). But neither the statute nor the decisions of this Court construing the statute deals in "incidents"; they require, as the majority Opinion concedes, that the mailings be "closely enough related to the fraudulent scheme" and be "for the purpose of executing the scheme" (Jt. App. 97). As Judge Swygert says, "The statute requires, therefore, a close and substantial nexus between the mailings and the fulfillment of the scheme" (Jt. App. 130).

The mailings proved in this case all fail to meet the controlling test. Rather than extend this petition beyond proper bounds, we respectfully direct the attention of the Court to Judge Swygert's detailed analysis of the five groups of mailings involved in this case (Jt. App. 132-139). He demonstrates convincingly that they are all an inadequate basis for federal jurisdiction under the statute.

The need for this Court to consider this matter arises primarily from the fact that the mail fraud statute is an important and frequently invoked criminal law. It is important that the reach of the statute be extended no further than Congress intended, particularly where, as in this case, the prosecution has deeply involved the federal government in an effort to vindicate interests that are so peculiarly within the realm of state government, as is always the case where the conduct of a state's public business is involved.

2. The decision below is in conflict with a decision of this Court holding that intent to use the mails is an essential element of the offense of conspiracy to commit mail fraud.

There was no evidence that petitioner knew, contemplated or agreed that the mails would be used in furtherance of the scheme. He contended in the courts below that agree-

ment to use the mails is an essential element of the offense of conspiracy to commit mail fraud and that he was entitled to a judgment of acquittal because there was no proof of that element. He also tendered an instruction incorporating that element, but the District Court modified the instruction by substituting "reasonably foreseeing a use of the mails in furtherance of [the conspiracy]" for "knowledge that the conspiracy contemplated unlawful use of the mails" (Tr. 5050-5053; 5120-5125; 5723-5724).[2] The Court of Appeals held that knowledge and intent that the conspiracy contemplated use of the mails were not elements of the offense (Jt. App. 103-106).

The decision below is in conflict with the decision of this Court in *Pereira* v. *United States*, 347 U.S. 1 (1954). In *Pereira* defendants contended that their convictions of both substantive mail fraud and mail fraud conspiracy placed them twice in jeopardy for the same offense. The Court held that the element of agreement to use the mails distinguished the conspiracy from the substantive offense (347 U.S. at 11). The Court went on to hold that the evidence was sufficient to sustain the conviction. The language of the Court repeatedly emphasizes that the nature of the conspiracy is an agreement to use the mails. It stated, for example:

> ". . . that an intent to collect on the check would include an intent to use the mails or to transport the

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[2] The opinion of the Court of Appeals indicates that this argument was advanced only by Peter V. Pappas (Jt. App. 103). In fact, all defendants joined in tendering the instruction at trial and all adopted the argument on appeal. Petitioner Walker secured a specific order from the Court of Appeals granting him leave to adopt the arguments of his co-appellants.

> check in interstate commerce. It was certainly not improper to allow the jury to determine from the circumstances whether Brading shared Pereira's knowledge and agreed with him as to the use of the only appropriate means of collecting the money." (347 U.S. at 12.)

Neither the decision nor the language of *Pereira* permits conviction on proof that defendant merely foresaw or could have foreseen the use of the mails. In these days many indictments set forth multiple counts of mail fraud and conspiracy. It is important that the elements of conspiracy to commit mail fraud be made clear for the guidance of the district courts and the courts of appeals.

3. The decision below sanctions suppression by the prosecution of exculpatory matter, even though demanded specifically and timely by petitioner, and thus conflicts with the principles underlying decisions of this Court which hold that production of such matter is required by due process of law.

The District Court, in ruling upon post-trial motions, clearly recognized the significance of the material to the defense:

> In any event, for the purpose of cross examining this witness for the Government, there is no question about the importance of that information, it would seem to me.
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> • • •
>
> The Court: I said, there is no question about the importance of that information at the hands of the defense at the time Carpentier testified. Also, as I understand it, proof that out of six state Senators that Donald Carpentier testified he mailed $100 to—
> Mr. Barnett: Out of eight that he testified to.

> The Court: Six out of eight that he said he mailed to, did not receive any such communication. It would have a bearing on whether or not the mailing described in the indictment in this case ever took place. There is no question about that. (Tr. Aug. 26, 1976, pp. 12 & 13.)

The Court of Appeals also assumed both the exculpatory character of the material (*Brady* v. *Maryland*, 373 U.S. 83 [1963]), and the timeliness and sufficiency of petitioner's request for production (*United States* v. *Agurs*, 427 U.S. 97 [1976]), but held that petitioner was not entitled to production because he knew the identities of the nine senators, had reason to believe that some of them, at least, would deny their participation in the illegal scheme, and could have subpoenaed them as trial witnesses (Jt. App. 115-117).

Brady v. *Maryland*, 373 U.S. 83 (1963), is founded on the principle that the search for truth will proceed most effectively if the barriers to the presentation of relevant evidence are minimized. Corollary to that principle is the concept that the government may not gain trial advantage by withholding material evidence from the defense. "Material", for these purposes, is a term of broad scope. This Court has held that it includes matter which relates only to the credibility of witnesses. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Giglio* v. *United States*, 405 U.S. 150 (1972). The Second Circuit has held that it extends to matter useful in preparation for trial. *Grant* v. *Alldredge*, 498 F.2d 376, 381 (1974).

The Court of Appeals did not apply these principles correctly because it equated access to the potential witnesses with access to their prior statements and testimony, and because it confused petitioner's right to cross-examine government witnesses with his right to put on witnesses of

his own. The need for these statements was, as the trial judge observed, mainly related to the cross-examination of Carpentier. This can be understood only with reference to the trial situation when Carpentier was tendered for cross-examination.

A single witness—Carpentier—had put Walker into the scheme. That witness had described the mailing of currency to Walker and to eight others who were not defendants in the case. Mention of the other mailings was superfluous. The government could have directed its witness to confine his testimony to the money he claimed to have sent Walker, but this would have lessened the aura of believability created by the asserted multi-mailing. Mention of the eight others in effect put the burden on Walker to bring them forward to show that Carpentier's testimony was false, and it put him to the immediate necessity of attacking Carpentier's credibility by asking him specific and detailed questions about the involvement of the others and their later behavior. This is where the statements would have been useful—to fight back against the implied suggestion that, if Carpentier was lying, he would not have dared mention mailings to others. And the reason the government fought tenaciously to withhold the statements is that it wanted to protect its witness against this cross-examination, which might have succeeded in undermining his credibility with the jury.

It is not the burden of a defendant to show that, but for the suppression, the result would have been different. Where the *Agurs* requirement of specific and timely request has been satisfied, as it was here, and where the failure of the prosecutor to produce the evidence is at least the result of negligence, then the test of materiality should be whether ". . . there was a significant chance that this

added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir., 1969). And where, as here, the failure to produce is deliberate, if not clearly obstinate (see Tr. 2667-2672), then the test of materiality should be correspondingly less stringent. The Second Circuit has said in this regard:

> Of course, as the prosecutor's culpability increases from unavoidable nondisclosure to negligent nondisclosure to deliberate suppression, "prophylactic considerations," *United States* v. *Pfingst, supra* at 277, designed to deter future prosecutorial misconduct begin to assume ascendant, and eventually paramount, importance. *Grant* v. *Alldredge*, 498 F.2d 376, 380-381 (2 Cir., 1974).

See also *United States* v. *McCrane*, 547 F.2d 204, 207 (3d Cir., 1976, on remand, see 427 U.S. 909).

We submit that this case is comparable to *Agurs* in presenting an important question of the scope and application of *Brady*. In *Agurs* the Court considered the effect of the specificity of defendant's request for production as it bears on the requirement of materiality. In the instant case the Court has an opportunity to further articulate the scope of the materiality requirement in a setting which involves deliberate suppression by the prosecution.

4. The making and use of tape recordings of petitioner's telephone conversations impinged on petitioner's constitutional rights to due process of law and to the assistance of counsel.

If the tape recordings involved in this case had been obtained in the same manner after indictment, at least the second and third, if not all three, would be excludable under

Massiah v. *United States*, 377 U.S. 264 (1964). Because the recordings were made before any formal charges against petitioner had been filed, however, we must concede that no previous decision of this Court would subject them to the exclusionary rule. Nevertheless, we respectfully submit that the Court should consider this issue for two reasons:

(1) Petitioner clearly was a target of the government investigation at the time the recordings were made. Since Carpentier, the only witness to incriminate petitioner, had already agreed to become an informant and had already provided the evidence against petitioner, the case against him was "made", and the delay in obtaining an indictment was only for some purpose of the government, not for lack of probable cause. When the facts that petitioner had counsel and that the government knew it are added to these circumstances, it is difficult to see how the absence of formal charges has any real significance. We therefore urge that the *Massiah* rule should be reconsidered and held to extend to cases where the absence of formal charges results only from government inaction. This result would constitute a significant and proper extension of the right to counsel, but it would not require the Court to hold that the right always or even usually attaches before the initiation of formal proceedings.

(2) Under the peculiar circumstances of this case, the conduct of the United States Attorney, in encouraging the accomplice-informant, Carpentier, to obtain incriminating statements surreptitiously, should be held a due process violation. Here too we frankly state that we seek extension of the exclusionary rule, which we believe to be justified to deter government infiltration into the privacy of persons about to be charged with an offense.

5. Adoption of petitions of co-defendants.

Co-defendants Robert Craig, Frank P. North, Jr., and Peter V. Pappas are filing petitions for certiorari contemporaneously with this one. In addition, co-defendant Craig and Louis A. Markert are filing a separate petition from another judgment raising an issue of legislative immunity.

Petitioner, Jack E. Walker, hereby adopts the arguments of his co-defendants, insofar as applicable to him, and he adopts the argument of petitioners Craig and Markert as respects legislative immunity.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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CHARLES R. PURCELL
Attorneys for Petitioner